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Supreme Court of the United States

OCTOBER TERM, 1960

No. 76

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an INTERNATIONAL LABOR UNION; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners*,

v.

WILSON P. LOCKRIDGE, *Respondent*.

On a Writ of Certiorari to the Supreme Court of the State of Idaho

BRIEF OF RESPONDENT

ROBERT W. GREEN
1110 Bank of Idaho Building
Boise, Idaho 83702

SAMUEL KAUFMAN
Anderson, Kaufman, Anderson & Ringert
705 Idaho Building
Boise, Idaho 83702

JOHN L. KILCULLEN
Gall, Lane, Powell & Kilcullen
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

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v.

WILSON P. LOCKRIDGE, *Respondent*

On a Writ of Certiorari to the Supreme Court of the State of Idaho

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Does a state court have sole or concurrent jurisdiction over an action by a union member against his union for reinstatement and damages where his expulsion from union membership was in violation of the contract embodied in the union constitution?

2. Does a state court have jurisdiction under Section 301 of the National Labor Relations Act, 29

USCA 185, of a violation of a collective bargaining agreement even though the conduct involved in that violation might "arguably" also be an unfair labor practice within the jurisdiction of the National Labor Relations Board?

3. Does a state court have jurisdiction of a suit by a union member for relief from the conduct of a union constituting a breach of its duty of fair representation even though such conduct might also "arguably" constitute an unfair labor practice under the jurisdiction of the National Labor Relations Board?

4. Should not this court continue to recognize that the "general rule" of *Garmon*, 359 U.S. 236, prohibiting state court jurisdiction over conduct which is "arguably" either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act is subject to congressionally carved exceptions and judicially recognized penumbral areas where the activity involved is but a mere peripheral concern of the Act or touches on matters deeply rooted in local interest and responsibility and jurisdiction of the courts is traditional?

STATEMENT OF THE CASE

From about May 16, 1943, to November 2, 1959, when the act giving rise to this controversy occurred, Respondent was a member of Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("union") and employed as a bus driver by Western Greyhound Lines or its predecessors.

Section 91 of the union constitution (Pl. Ex. 34; R-10) provided that when a member allowed his dues delinquency to run over the last day of the *second*

month without payment he suspended himself from membership in the union. Section 91 additionally specified that where agreement with an employing company provided that the members must be in *continuous good financial standing*, a member in arrears one month *may* be suspended from membership.

Section 3 of contract B, the collective bargaining agreement between the union and Greyhound pertinent to this action (Pl. Ex. 35; R-10)[1/] required only that employees become and remain *members*. It did not require that they *maintain membership in good standing* as did other bargaining agreements.[2/] (A.88)

As of October 22, 1959, Respondent had not yet paid his dues for September or October. C. A. Bankhead, Treasurer and Financial Secretary of Division 1055 of the union, wrote to Respondent calling to his attention the fact that his September dues had been returned to him by Greyhound and that his dues for the month of *September* must be paid by October 28. A. 80, 81. Respondent paid his September dues and received a receipt therefor from Bankhead dated October 26. A. 73, 82. His dues for October, however, remained unpaid and on November 2 Bankhead advised

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1/ "3. Membership in and Recognition of the Association, Grievances and Arbitration: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and *shall remain members* as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY." (Emphasis supplied)

2/ Pl. Ex. 35 consists of two contracts: Contract B on white paper and Contract C on yellow paper. The agreement pertinent to Respondent is Contract B, the white portion of the exhibit. Contract C, the yellow portion, applied elsewhere and required that employees "*maintain such membership in good standing.*" (p. 75) A. 59, 73, 74. (Emphasis supplied)

Greyhound that Respondent and one Elmer J. Day (in a like situation) had suspended themselves from membership in the union and requested their removal from employment in compliance with Section 3 of Contract B. A. 82. Respondent was thereupon terminated from his employment by Greyhound. A. 85, 86. The *sole ground* for the suspension of Respondent from membership in the union was failure to tender periodic dues. A. 59, 78.

Elmer Day filed an unfair labor practice charge with the National Labor Relations Board but his petition was rejected by the Regional Director of the Board on the ground there was insufficient evidence of violation of the National Labor Relations Act. There was no explanation of this determination or reasons given for the conclusions reached. A. 13, 14. He thereafter filed suit against the union, Bankhead and others who were subsequently removed from the case. Judgment in his favor was reversed by the Supreme Court of Oregon[3/] on a misconstruction of the pre-emption doctrine (not without dissent) and this court denied certiorari (379 U.S. 878).

Following rejection of Day's charge by the National Labor Relations Board, Respondent filed the instant case in state court. Respondent originally named Greyhound as a joint defendant but being unable to unearth any proof that Greyhound knew of the misrepresentation by the union that Respondent's membership had been properly terminated, he filed an amended complaint in which only the Petitioners were defendants (A. 14-22) and subsequently filed a second amended complaint (A. 43-48) asserting in count one

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3/ *Day vs. Northwest Division 1055, et al*, 389 Pac. 2d 42.

a tortious suspension from membership in the union with resulting discharge and loss of employment and in count two, violation of the union constitution or breach of contract with like results. It was the second amended complaint and answer thereto upon which the case went to trial.

During the course of this extended litigation, Petitioners raised the defense that Respondent was in truth subject to suspension from membership in the union in accordance with the constitution and bargaining agreement. This contention was rejected by the trial court, holding that Section 91 of the constitution and the bargaining agreement were clear; that the bargaining agreement required only that Respondent remain a *member* of the union, not that he *maintain membership in good standing* and, therefore, Respondent had until the last day of the second month of delinquency or until the end of November before being subject to suspension for failure to tender periodic dues. A. 36, 64. Petitioners' argument was also rejected by the Idaho Supreme Court on several grounds, first, by fully agreeing with the interpretation of the lower court and, secondly, that Petitioners had not assigned this ruling and finding of the lower court as error on the appeal. A. 97. In fact, none of the trial court's findings of fact were assigned as error on appeal to the Idaho Supreme Court. A. 106, 107.

It was the conclusion of the lower court, in awarding judgment to Respondent, that the constitution and bylaws of the international union constituted a contract between the union and the members and that in suspending Respondent from membership in the union for delinquency in dues, when his delinquency was not such as to subject him to suspension and con-

trary to all custom within the union, the union violated the contract between the union and Respondent.[4/]

Though Respondent's second amended complaint contained two counts, one sounding in tort and the other for breach of contract, judgment was awarded Respondent for breach of contract only. While Respondent had not specifically sought such a remedy (in addition to damages, he sought general equitable relief) the court concluded that he was entitled to all relief warranted by the evidence and ordered him reinstated to union membership. A. 66. This is in accordance with the Idaho Rules of Civil Procedure.[5/] The Idaho Supreme Court determined that this was the primary relief to which he was entitled and damages were a secondary consideration. A. 100.

The issue presented by Petitioners on appeal to the Idaho Supreme Court was whether Respondent's action in the state court was pre-empted by federal law;

4/ "That the Constitution and By-Laws of the International Union constitute a contract between the union and the members thereof and in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and contrary to all custom within Division 1055, defendants, whose officers and agents acted in concert, violated said contract." Conclusion of Law VI. A. 65.

Also: "The constitution and bylaws of the defendant union and the granting and acceptance of membership, constituted a contract between the plaintiff and defendant. 7 CJS Associations § 11b." *Lockridge vs. Amalgamated, etc.*, 84 Idaho 201, 369 Pac. 2d 1006. A. 28.

5/ "***Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), Idaho Rules of Civil Procedure. Also, *Burke Land & Livestock Co. vs. Wells, Fargo & Co.*, 7 Idaho 42, 60 Pac. 87; *Dover Lbr. Co. vs. Case*, 31 Idaho 276, 170 Pac. 108; *Swanstrom vs. Bell*, 67 Idaho 554, 186 Pac. 2d 876; *Vaneck vs. Foster*, 74 Idaho 532, 263 Pac. 2d 997. Rule 54(c), Federal Rules of Civil Procedure, is identical.

whether the matter was one for the sole cognizance of the National Labor Relations Board. No findings of the trial court were assigned as error and Petitioners must now be bound thereby. Respondent cross-appealed on several grounds concerning damages and also complained that the lower court had failed to restore him to membership in the union with commensurate restoration of seniority. The Idaho Supreme Court rejected his contentions concerning damages but did order the judgment modified to include restoration of seniority within the union.[6/] A. 109-111.

SUMMARY OF ARGUMENT

State court jurisdiction is not pre-empted in this case for three basic reasons:

A. In wrongfully suspending Respondent from membership in the union, Petitioners violated the constitution which itself constitutes a contract between the union and its members and Petitioners are therefore answerable for breach of contract in a state court. This suspension involved an "internal union matter," at most of mere peripheral concern to the Taft-Hartley Act, and the court in ordering reinstatement to union membership, afforded a remedy not available through the National Labor Relations Board. Actions for breach of contract of this nature are within the traditional jurisdiction of the courts and touch interests deeply rooted in local feeling and responsibility.

B. The union breached or motivated the breach of the bargaining agreement between the union and Greyhound for which it is answerable in the courts

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6/ Membership seniority is recognized by the union constitution: Those longest in service have the greatest seniority. (Sections 160-163, Union Constitution, Pl. Ex. 34; R-10).

under the plain language of Section 301, National Labor Relations Act (29 USCA 185) and Respondent has a remedy in the courts even though the union conduct is or might "arguably" be an unfair labor practice.

C. As the exclusive agent of Respondent on all matters pertaining to his employment, the union wrongfully suspended Respondent from membership, caused a breach of the bargaining agreement and his loss of employment, and violated its duty of fair representation.

ARGUMENT

1. THE UNION CONDUCT CONSTITUTED A BREACH OF CONTRACT BETWEEN THE UNION AND RESPONDENT.

It is the law of Idaho and most other jurisdictions that the union constitution and bylaws constitute a contract between the union and its individual members[7/] and this court has recognized that "this contractual conception of the relations between the member and his union widely prevails in this country."[8/] In suspending Respondent from membership contrary to the provisions of the constitution, the union breached this contract.

The wrongs suffered by Respondent had their origin in this wrongful suspension from union membership. Having breached this contract, the union induced and was a party to a breach of the bargaining agreement by misrepresenting Respondent's membership status

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7/ *Lockridge vs. Amalgamated Association, etc.*, 84 Idaho 201, 369 Pac. 2d 1006.

8/ *International Association of Machinists vs. Gonzales*, 356 U.S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923 *(Gonzales)*.

to Greyhound and requesting Respondent's discharge.

The loss of employment, which followed the suspension from membership, was the result of this union conduct and formed the basis for ascertaining damages flowing from the primary act of breaching the contract.

The facts here are closely akin to those existing in *Gonzales*. Therein, Gonzales was wrongfully expelled from his union. As a result of such expulsion he was denied employment and thereupon brought suit against the union for breach of contract, seeking restoration of his membership, damages for the loss of wages which followed his expulsion and damages for mental suffering. Judgment in his favor was affirmed by this court.

> "***In the judgment of the Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to 'discriminate against an employee with respect to whom membership in such organization has been denied or terminated *on some ground other than his failure to tender the periodic dues* and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .' 61 Stat 141, 29 USC § 158(b)(2). But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to pre-

ascribe its own rules with respect to the acquisition or retention of membership therein . . . .' 61 Stat 141, 29 USC § 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' *Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act.* See United Constr. Workers v. Laburnum Constr. Corp. 347 US 656, 98 L ed 1025, 74 S. Ct 833."[9] (Emphasis supplied)

Here, no circumstances were established for suspension other than failure to pay dues. It constituted the *sole ground* for suspension,[10] a finding not assigned as error on appeal to the Idaho Supreme Court.

Petitioners concede that it is not an unfair labor practice for a union to suspend a member and cause an employer to discriminate against him on the grounds of failure to tender periodic dues (Section 8(b)(2), National Labor Relations Act; 29 USC 158(b)(2). They assert, however, that this is a "protected" activity. They postulate that there are only two types of activities, those protected and those

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9/ *International Association of Machinists vs. Gonzales*, Note 8, supra.

10/ A. 59, 78.

prohibited and if an act is not prohibited by Section 8, it must, a fortiori, be protected. With this hypothesis Respondent disagrees.

Prohibited activities are outlined in Section 8 of the Act. Those delineated in Section 8(a) refer to activities prohibited of employers while those specified in Section 8(b) are activities prohibited of a labor organization. Section 7 refers to protected activities of "employees"—individuals. The union cannot claim that its conduct here falls under the mantle of protected activities of employees under Section 7. Not only is the union not an "employee" but its conduct in the instant case does not constitute one of the activities protected. The conclusion that if its conduct is not prohibited by Section 8(b) it must of necessity be protected is without merit. If the union conduct is not proscribed by Section 8(b) it constitutes conduct outside the scope of the Act and not regulated thereby.

Petitioners then assert that since they were in error in their interpretation of the union constitution and the bargaining agreement and Respondent was not in fact so delinquent in his dues as to be subject to suspension with resulting loss of employment, he must have been suspended from the union for some reason other than failure to tender dues and this would constitute an unfair labor practice. This is a spurious argument.[11/]

There are two factual differences between *Gonzales*

11/ By like delusive reasoning, Petitioners would urge that if a goose hunter killed a swan, erroneously thinking it to be a goose, a fortiori, since the bird wasn't actually a goose, the hunter must have killed it for some reason other than he thought it was a goose. Despite the error of the hunter, the fact remains that his *sole* reason for killing the bird was that he thought it was a goose.

and the instant case. First, Respondent here did not specifically pray for restoration of union membership as part of his relief. Nevertheless, he prayed for all equitable relief, and,

> "The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief. His prayer for equitable relief was framed in general terms and this court concludes that in this case or any other within the narrow area where we can assert jurisdiction to relieve wrongfully denied membership, the primary relief which can and shall be granted is restoration of union membership. Damages, if any, are a secondary consideration and shall be limited to compensation for damage suffered until such time as membership is restored."[12/]

This conforms to the law and Rules of Civil Procedure prevailing in Idaho[13/] (and in the federal courts) and to attempt to distinguish *Gonzales* on the grounds of relief sought as opposed to relief granted is nebulous indeed. Additionally,

> "The possibility of conflict from the courts awarding damages in the present case is no greater than from its order that Respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of the juris-

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12/ Decision of the Idaho Supreme Court. A. 99, 100.

13/ Note 5, supra.

diction to vindicate the personal rights of an ousted union member."[14/]

Secondly, Respondent lost his employment because of a union shop clause in the collective bargaining agreement whereas in *Gonzales* such an agreement did not exist and Gonzales was unable to obtain employment after expulsion from the union because of a refusal of the hiring hall to refer a nonunion member for work. While the hiring hall practices in *Gonzales* were of mere incidental concern, unlike *Borden*[15/] where the difficult and complex operations thereof were considered to be the "crux" of the case, it would seem that a determination in favor of state court jurisdiction in this case is even more compelling than it was in *Gonzales.*

There is no federal pre-emption in favor of union security clauses; in fact, contrary to assertions of Petitioners that a union security clause is one which Congress obviously regarded as at the heart of the National Labor Relations Act (Petitioners' brief, pp. 20, 51), Congress especially disclaimed any federal policy. Section 8(a)(3) carries the specific proviso "that nothing in this act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or such agreement, whichever is the later, * * *." Then to make its intent entirely clear, Congress added Section 14(b) which provides:

14/ *International Association of Machinists vs. Gonzales,* Note 8, supra.

15/ *Plumbers Union vs. Borden,* 373 U.S. 690, 10 L. Ed. 2d 638, 83 S. Ct. 1423 *(Borden).*

> "Sec. 14(b). Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by State or territorial law."

Section 8(a)(3) "merely disclaims a national policy hostile to the closed shop or other forms of union security agreement."[16/] Section 14(b) "was included to forestall the inference that federal policy was to be exclusive" on this matter of union security agreements.[17/] A number of states have prohibited the union shop under the specific authorization given them by Congress. Idaho has not done so but its inaction in this regard detracts nothing from the fact that it, or any other state, can so act if it chooses, and that far from being at the very heart of the National Labor Relations Act, regulatory control of union security clauses has thus been divided between state and federal jurisdiction rather than being pre-empted. By these statutory enactments, Congress has disclaimed the assumption of exclusive federal control and has really done nothing more than proclaim that the federal policy is not hostile to union security clauses.

There is certainly less reason therefore to consider the instant case as pre-empted than *Gonzales* where a hiring hall was involved.

Petitioners urge that the general rule of *San Diego*

16/ *Algoma Plywood Co. vs. Wisconsin Board*, 336 U.S. 301, 314, 93 L. Ed. 691, 702, 69 S. Ct. 584.

17/ *Retail Clerks vs. Schermerhorn*, 375 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219.

Bldg. Trades Council vs. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773, supported by *Plumbers Union vs. Borden*, 373 U.S. 690, 10 L. Ed. 2d 638, 83 S. Ct. 1423, and *Iron Workers vs. Perko*, 373 U.S. 71, 10 L. Ed. 2d. 646, 83 S. Ct. 1429, requires that state jurisdiction be relinquished here. Such is not the case. *Garmon* itself recognized that state regulation over a particular area of activity must give way only where such regulation threatened interference with the clearly indicated policy of industrial relations.

> "However, due regard to the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Asso. of Machinists v. Gonzales, 356 U.S. 617, 2 L ed 2d 1018, 78 S. Ct. 923. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[18/]

The *Garmon* rule is mischaracterized by Petitioners' statement that "conduct which is even arguably protected or prohibited under the act is pre-empted."[19/] Such a statement ignores the rationale for the rule, states only a portion of the rule and thereby blithely eliminates the existence of both statutory exceptions

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18/ *San Diego Bldg. Trades Council vs. Garmon*, supra.

19/ Petitioners' brief, p. 16.

and the judicially recognized "penumbral area" in which certain types of conduct fall within the jurisdiction of state courts or the concurrent jurisdiction of the Board and the state courts.

In any case of potential concurrent jurisdiction, the primary inquiry is what effect, if any, state court action might have on clearly defined national policy of industrial relations. Petitioners have not addressed themselves to this question, preferring only the incantation of the "arguably subject" portion of the *Garmon* rule.

A consideration of the impact of the decision herein being reviewed on declared national policy of industrial relations is clarified by the *Garmon* rule. If there would be no effect, or only slight impact on national labor policy, then obviously the activity regulated would be only a "peripheral concern" of the act and state jurisdiction would not be pre-empted.

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the exertion of any such power has been expressly denied."[20/]

Neither *Borden* nor *Perko* are in hopeless conflict with *Gonzales*. While concededly the pre-emption doctrine probably reached its apogee in *Borden*, the predicate of the court's conclusion as to pre-emption was its prerequisite determination of the existence of a matter of national labor policy and the possibility of conflict therewith. In *Borden* the difficult and complex operation of union hiring halls did, in the opinion of

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20/ *International Association of Machinists vs. Gonzales*, Note 8, supra.

the court, require that competence in adjusting such matters should be limited to a single expert federal agency. In *Perko*, the determinations of the difficult problem of employee status was, in the opinion of the court, "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the act as a whole."

In the instant case there exists no such pressing consideration of national policy. Here the fountainhead of the controversy involves a dispute between a union member and his union over matters of internal union policy. Respondent's loss of employment status which followed his expulsion from the union in accordance with the union security clause is not the overwhelming determinative force of this matter as Petitioners contend. It is apparent that this "internal union matter" involves no national labor policy or at most is of "mere peripheral concern" thereto.

Additionally, the *Garmon* rule contains another aspect which should not be ignored. It concedes that state courts should not be deprived of jurisdiction in cases involving conduct touching interests deeply rooted in local feeling and responsibility. This reflects this court's concern with the need to provide a remedy when a serious wrong has been charged. To preclude a state court from exerting its traditional jurisdiction in such a case on the remote possibility of some entanglement with the Board's enforcement of national policy "would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act."[21/]

This aspect of the Garmon rule has been followed

21/ *International Association of Machinists vs. Gonzales*, Note 8, supra.

in *Linn vs. Plant Guards Local No. 114*, 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657, to afford state court relief to a management representative for a malicious libel by a union; in *Vaca vs. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903, to allow state court relief to a union member for his union's breach of its duty of fair representation; in *Food Employees vs. Logan Valley Plaza*, 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (recognized in *Taggart vs. Weinacker's*, 397 U.S. 223, 25 L. Ed. 2d 240, 90 S. Ct.____), to allow state court prohibition of labor picketing which is obstructive to the use of private property. Moreover, it is beyond dispute that state courts reserve jurisdiction to restrain actual or threatened violence (*Youngdahl vs. Rainfair, Inc.*, 355 U.S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206, and *United Auto A. & A. I. W. vs. Wisconsin Empl. Rel. Bd.*, 351 U.S. 266, 100 L. Ed. 1162, 76 S. Ct. 794), or to grant compensation for the consequences, as defined by traditional law of torts, of conduct marked by violence and imminent threats to the public order (*Automobile Workers vs. Russell*, 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932; *United Constr. Workers vs. Laburnum Corp.*, 347 U.S 656, 98 L. Ed. 1025, 74 S. Ct. 833).

Enforcement of the contractual relationship between Respondent and his union is one of the traditional areas of state concern within the purview of the *Garmon* rule. *Gonzales* has not been overruled and continues to be recognized as pinpointing one of the areas where state court jurisdiction prevails. (*Vaca vs. Sipes*, supra) Therein this court affirmed that the principle laid down in *Garmon* constituted a general rule only and was not to be applied in every instance:

"This pre-emption doctrine, however, has never

been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the N.L.R.B."

Referring then to the various statutes specifically authorizing court actions, this court added *(Vaca vs. Sipes*, supra):

"In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . /or/ touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.' San Diego Building Trades Council v Garmon, 359 US, at 243-244, 3 L ed 2d at 781, 782. See, e.g., Linn v Plant Guard Workers, 383 US 53, 15 L ed 2d 582, 86 S ct 657 (libel); Automobile Workers v Russell, 356 US 634, 2 L ed 2d 1018, 78 S Ct. 923 (violence); International Assn. of Machinists v Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923 (wrongful expulsion from union membership); Allen-Bradley Local v Wisconsin Employment Relations Board, 315 US 740, 86 L ed 1154, 62 S Ct 820 (mass picketing). See also Hanna Mining Co. v Marine Engineers Beneficial Assn., 382 US 181, 15 L ed 2d 254, 86 S Ct 327. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-emp federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the

administration of national labor policies of concurrent judicial and administrative remedies."

Thus, Petitioners and supporting amici urge blind adherence to the general rule of *Garmon* and accord no concern whatsoever to the congressionally carved exceptions or to those areas recognized in *Garmon* itself as not sufficiently infringing upon national labor policy and of mere peripheral concern to the act or involving matters deeply rooted in local interest and responsibility.

Certainly the wrongful expulsion of Respondent from his union, with his subsequent loss of employment is, as the Idaho Supreme Court pointed out, critical from the individual member's viewpoint but hardly one involving national labor policy, and as could be no more clearly presented by the facts of this case, if the state court is denied its jurisdiction, Respondent would never again regain his union membership. (A. 105). Elmer Day obtained no relief from the Board nor would Respondent. The Board's present position, set forth in its amicus brief, appears to be nothing more than a doctrinaire protectionism of union activity with utter disregard of the rights of the individual workers. The Board now urges, in effect, that it should have the exclusive jurisdiction to deny Respondent a remedy. It is inconceivable that today in these United States, while this court has been courageously fostering and protecting individual rights and liberties, a man can be wrongfully expelled from his union with resulting loss of employment and yet be denied protection or relief in any form or in any forum. This is not and cannot be congressional policy.

That injustices can and do result from an all-encompassing application of the "arguably" rule, without

regard to the recognized areas where it should not be applied, is beyond question. The recently expressed sentiment[22/] for a re-examination of this aspect of *Garmon* and possible clarification of the rule indicates an awareness of the inadequacies of such a general application of the *Garmon* rule. By urging such an all-encompassing application of *Garmon*, Petitioners in effect beseech this court to repeal by judicial fiat the congressionally carved exceptions and wipe out those "penumbral areas" where the activity regulated has little or no effect upon national labor policy or where application of the rule would result in injustices and deprive state courts of traditional jurisdiction.

2. THE UNION CONDUCT ENCOMPASSED A BREACH OF THE BARGAINING AGREEMENT FOR WHICH THE UNION IS ANSWERABLE IN THE COURTS.

Though judgment in this case appears to be predicated upon a breach of the union constitution, the pleadings and the evidence amply support a charge of a breach of the bargaining agreement and the judgment is easily sustained as one lying within the ambit of Section 301, National Labor Relations Act (29 USCA 185).

Section 3 of the bargaining agreement requires that all employees become and remain members of the union. Section 4(b) provides that no employee shall be dismissed from service without sufficient cause.[23/]

22/ Justice White joined by the Chief Justice and Justice Stewart in *Longshoremen vs. Ariadne Shipping Co.*, 397 U.S.____, 25 L. Ed. 2d 218, 90 S. Ct.____

23/ A. 88.

Because Respondent was not so delinquent in dues payments so as to be subject to suspension, his termination from service was without sufficient cause and violated the bargaining agreement. The union motivated and was a party to this violation through the wrongful suspension and notification thereof to the employer, and the union is answerable therefor in the courts under Section 301.

While Respondent's complaint may not have expressly referred to a Section 301 violation, "/s/ince substance and not form must govern, however, we look to the allegations of the complaint and to the federal labor statutes to determine the nature of the claim."[24/]

If Respondent's termination from service violated the bargaining agreement it is within the cognizance of federal and state courts "even if it is, or 'arguably' may be, an unfair labor practice." *(Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed 2d 370, 84 S. Ct. 363; *Smith vs. Evening News Assn.*, 371 U.S. 195, 9 L. Ed. 2nd 246, 83 S. Ct. 267). "Garmon and like cases have no application to § 301 suits. Smith vs. Evening News Assn. 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267." *(Vaca vs. Sipes*, supra)

Petitioners strongly contend throughout their brief that the union conduct in this case involved a violation of the collective bargaining agreement. Petitioners cannot claim that the gravamen of the action is a violation of the collective bargaining agreement and yet deny that the litigation falls within the purview of Section 301 which provides for relief in the courts from such a violation.

24/ Separate opinion of Justice Goldberg, joined by Justice Brennan, *Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed. 2d 370, 84 S. Ct. 363.

"The concept that all suits that vindicate employee rights arising from a collective bargaining contract shall be excluded from the coverage of § 301 has thus not survived. * * *"

"The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions."[25/]

Section 301 is to be liberally construed and not to be given a narrow reading. *Textile Workers Union vs. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912; *Smith vs. Evening News Association*, supra.

Petitioners' claim, therefore, that its conduct was "arguably" prohibited and "arguably" an unfair labor practice is insufficient foundation for precluding state court jurisdiction where, as here, there was a violation of the bargaining agreement.

3. THE UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION AND THAT MATTER IS ACTIONABLE IN THE COURTS.

The broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility and duty of fair representation. *Czosek vs. O'Mara*, 397 U.S.___, 25 L. Ed. 2d 21, 90 S. Ct. ___; *Vaca vs. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903; *Glover vs. St. Louis & SFR Co.*, 393 U.S. 324, 21 L. Ed. 2d 519, 89 S. Ct. 548; *Humphrey vs. Moore*, 375 U.S. 335, 11 L. Ed. 2d 370, 84 S. Ct. 363; *Conley vs. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S.

25/ *Smith vs. Evening News Association*, supra.

Ct. 99; *Syres vs. Oil Workers International Union*, 350 U.S. 892, 100 L. Ed. 785, 76 S. Ct. 152; *Ford Motor Co. vs. Huffman*, 345 U.S. 330, 97 L. Ed. 1048, 73 S. Ct. 681; *Brotherhood of Railroad Trainmen vs. Howard*, 343 U.S. 768, 96 L. Ed. 1283, 72 S. Ct. 1022; *Steele vs. Louisville & NR Co.*, 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226; *Tunstall vs. Brotherhood of Loc. Firemen and Engineers*, 323 U.S. 210, 89 L. Ed. 187, 65 S. Ct. 235.

In *Vaca vs. Sipes*, 386 U.S. 177, citing *Humphrey vs. Moore* with approval, this court stated:

> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

Following its recognition of the congressionally carved exceptions as well as judicially recognized "penumbral areas" of the *Garmon* rule, this court then noted:

> "*A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation.* The doctrine was judicially developed in Steele and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair

labor practice jurisdiction over union activities by the LMRA. * * *" Id. at 180, 181. (Emphasis supplied)

Thus, since the landmark decision in *Steele*, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.

> "Were we to hold as petitioners and the Government urge, that the courts are foreclosed by the NLRB's Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his Complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. ***The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted NLRA § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." Id. at 182, 183.

That the Board would be unwilling or unable to remedy the union conduct here is manifest from its determination on the charge filed by Day.

Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many § 301 suits must adjudicate whether the union has breached its duty, "the courts may also fashion remedies for such a breach of duty." Id. at 188. Judgment may be had against the union from those damages flowing from its own conduct. *Czosek vs. O'Mara*, supra; *Vaca vs. Sipes*, supra.

In the instant case, while the termination from service was the act of the employer, it was motivated solely by wrongful union conduct. Had the employer refused to terminate Respondent's service following notification by the union that he had been suspended from union membership, the employer would have undoubtedly been faced with a strike or other pressure of like nature. The employer's conduct, while it constituted a breach of the bargaining agreement, was motivated in its entirety by the union's breach of duty of fair representation and the damages accruing to Respondent resulted from the union conduct. It is not necessary that the employer be made a party to the action, particularly when it cannot be shown that the employer was in any way implicated in the union's discriminatory action. Since the union has acted independently causing damage to Respondent, it cannot complain if those damages attributable to its conduct are sought in an independent action against it. *Czosek vs. O'Mara*, supra.

The allegations of the complaint and the facts found by the trial court clearly sustain a charge that the union did not fairly represent Respondent. Rather than protecting him in his employment, it wrongfully suspended him from union membership, knowing that in so doing his employment would be terminated. Fur-

thermore, it acted in a manner never before indulged in when members were delinquent in their dues[26/] (A. 64, 65) and did not proceed in accordance with its own constitutional requirements[27/] (A. 64, 65).

Not only were others not suspended for delinquencies in dues, but the financial secretary even paid the dues of others out of his own pocket so that they would not become delinquent (R. 125-126), and yet refused to accept repeated tenders of Respondent's dues after his suspension (A. 70, 71). Even international officers of the union became involved and consented to, if they did not actually direct, the suspension.[28/]

The attitude of the union was probably epitomized by its international president when he wrote to Respondent in reply to his entreaty for reinstatement:

> "I wish to add, however, that even if I had the power to waive Section 94, I would not***." (A. 94)

It would appear that here we have a most flagrant violation of the duty of fair representation for which the union must answer in the courts.

The judgment below should be affirmed.

26/ "Additionally, it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded sixty days, it being the custom of Division 1055 in the past, and almost without exception, to remove the delinquent member only from service rather than suspend him from union membership and immediately upon payment of his delinquent dues, put him back in service without loss of seniority." Trial court Findings of Fact VII. A. 60, 61; Trial court Conclusion of Law III, A. 64, 65.

27/ "Additionally, the financial secretary of Division 1055 did not report at the last meeting prior to suspension, that plaintiff or Day were in arrears in dues." Trial court Finding of Fact VII. A. 61. See, also, Section 93 of the union constitution (Pl. Ex. 34; R-10) which requires that the names of delinquent members be read at the last meeting of every month before suspension.

28/ Trial court Conclusion of Law III. A. 64.

CONCLUSION

The decision below accomplishes precisely that which was permitted in *Gonzales*.

> "The purpose for which we exercise jurisdiction is to avoid leaving 'an unjustly ousted member without remedy for the restoration of his important union rights'."[29/]

In wrongfully suspending Respondent from union membership, the union breached the contract (constitution) between the union and the members. This was an internal union matter of mere peripheral concern of the National Labor Relations Act and an activity, the regulation of which, was deeply rooted in local interest and responsibility. Additionally, the activity of the union involves a breach of the bargaining agreement for which the union may be forced to respond in damages in state court under Section 301 of the National Labor Relations Act. Lastly, the facts alleged and proved in this case establish a cause of action and sufficient predicate for judgment against the union for breach of its duty of fair representation for which Respondent may seek redress in the courts.

Respectfully submitted.

ROBERT W. GREEN
1110 Bank of Idaho Building
Boise, Idaho 83702
SAMUEL KAUFMAN
ANDERSON, KAUFMAN,
ANDERSON AND RINGERT
503 Idaho Building
Boise, Idaho 83702
JOHN L. KILCULLEN
GALL, LANE, POWELL &
KILCULLEN
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondent

29/ Decision of the Idaho Supreme Court. A. 100.